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Supreme Court of the United States

OCTOBER TERM, 1953

WEST TEXAS UTILITIES COMPANY, INC. and PRICE CAMPBELL, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL), *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

West Texas Utilities Company, Inc. (hereinafter "the employer"), and Price Campbell, its president, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, one judge dissenting, holding them in civil contempt of a prior decree of that Court enforcing an order of the National Labor Relations Board ("the Board").

DECISIONS BELOW

The opinion and decree of the Court of Appeals in the instant proceeding appear at R. 516-529, 537-538. It is not yet reported. The opinion entering the original decree is reported at 184 F. 2d 233 (D. C. Cir. 1950), *cert. denied*, 341 U. S. 939.

JURISDICTION

The cause arises under the Labor Management Relations Act of 1947, 29 U.S.C. §§ 151 *et seq.* The opinion of the Court of Appeals was rendered April 28, 1953. Its judgment, amended on petitioners' timely motion (R. 530-537), adjudicating petitioners in civil contempt and denying their counterclaim to vacate the original decree, was entered May 8, 1953 (R. 538). Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the construction of the provisos of Section 9(a) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947 (the "Act"), and particularly concerns the significance of the 1947 amendment to the prior language. In full text, with the 1947 amendments in brackets and italicized, Section 9(a) reads as follows [49 Stat. 453 (1935), as amended 61 Stat. 143 (1947), 29 U.S.C. § 159(a)]:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer [*and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-*

bargaining contract or agreement then in effect: Provided further, *That the bargaining representative has been given opportunity to be present at such adjustment."*]

STATEMENT

In September 1947, relying on the opinion of the Board's General Counsel, the employer had declined to bargain with the Union because of the AFL's failure to comply with the oath and reporting requirements of Section 9(h) of the Act, 29 U.S.C. § 159(h). *West Texas Utilities Co.* v. *NLRB*, 184 F. 2d 233, 234-5 (D.C. Cir. 1950). In November 1947, four days after the AFL complied, the Board issued a complaint against the employer. *Id.* at 234. On the sole basis of the September refusal, it found an unfair labor practice and ordered the employer to bargain with the Union. *West Texas Utilities Co.*, 85 N.L.R.B. 1396 (1949). (It absolved the employer of any responsibility for the intervening execution of decertification petitions by most of the 276 employees in the unit.)[1] The lower Court decree, enforcing the Board's order, became effective in June 1951 (R. 517).

That decree had been entered solely on the basis of the determination of the legal question whether the employer had a duty to bargain before the AFL complied with § 9(h) of the Act. There had been no bargaining whatever. The contempt decree, however, was addressed to later developments when the parties for the first time conducted extensive negotiations. Specifically, the court below found *per se* contempt of its order to bargain in the employer's subsequent adjustment of wage grievances of a majority of the employees in the unit, acting on a petition which they had filed under 9(a) of the Act. These adjustments

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[1] *West Texas Utilities Co.*, 85 N.L.R.B. 1396, 1399-1400, 1427 (1949). The Board rejected the defense that the Union did not represent a majority of the employees by a presumptive finding, without evidence, that the loss was in fact due solely to the employer's refusal to bargain while the AFL was out of compliance.

were not made until March 28, 1952, following eight months of bargaining with the Union, and a deadlock on the wage issue. The Court held no hearing and considered no fact other than the making of the adjustments. It totally disregarded the situation in which the adjustments were made, concerning which there is no real dispute. As shown by the voluminous pleadings and affidavits of the parties, the circumstances were as follows:

Between August 1951 and March 1952 the parties had bargained at length (R. 22). They had agreed on numerous subjects and signed 63 contract clauses (R. 25, 194-196). They had not agreed on wages because the Union had insisted on across-the-board increases while the employer held out for the establishment of rate ranges and the negotiation of variable increases reflecting the merits of the various employees concerned[2] (R. 34-36, 56-57, 59-60, 129, 178, 205-206, 227). By October 24, 1951, this had precipitated a deadlock on the wage issue which persisted throughout the negotiations.[3] At that time the Union turned down a proposal, offering rate range tops within 2½¢ of its demanded uniform increases (R. 196),

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[2] This is a familiar method of wage administration. See, e.g., the Wage Stabilization Board's definition of "Rate Range Method of Payment". 32A C.F.R. (1951 Rev.) 1751. The employer favored such an incentive method because the work of the employees, maintaining and servicing thousands of miles of power lines, was largely unsupervised and individually performed (R. 133-134, 159, 199-200, 237-240).

[3] The Board's pleadings below described the deadlock as follows:

Petition (R. 4): "Respondents have insisted, at all times since the commencement of bargaining, that wages and/or wage rates be negotiated separately and individually for each of the approximately 276 employees in the bargaining unit, and have refused to negotiate for a fixed rate for all employees within a specified classification, or to negotiate for a fixed percentage of increase, or for a fixed amount of increase, for all employees within the unit with further negotiations to adjust any individual inequities that might exist."

Reply (R. 360): "Affirmatively, it is asserted that the Union at all times opposed this method of negotiating wages."

and broke off negotiations, with the express threat of "lodging .... contempt of court charges against the Company" (R. 31). Later, on March 10, 1952, the employer made a comprehensive wage offer, proposing average increases of 14¢ per hour (R. 40, 42, 61-67, 68). The Union rejected it with a renewed request for across-the-board increases and a demand that the employer "advise promptly of your willingness to alter your position" (R. 68).

Thereafter, a majority of the employees (whose repeated decertification petitions had been dismissed by the Board without hearing)[4] sought the adjustment of wage grievances through an attorney they had retained, one Maurice V. Brooks (R. 334, 336). He requested a meeting with the employer and submitted their petitions invoking Section 9(a) of the Act and reciting the rise in the cost of living during the prolonged negotiations (R. 334, 460). Upon advice of counsel that it had a duty to grant the request (R. 72, 210, 335), the employer met with Brooks on March 28, 1952 (R. 456). Although notified of the time and place and invited to participate, the Union failed to attend (R. 144-145, 174-175, 396-398, 435-436, 454, 456-476, 501-502).[6] At the meeting wage grievances were adjusted for 205 employees whom Brooks represented (R. 74-79, 456-474). The adjusted wages were substantially the same as the Union had previously rejected (R. 74-79).[7] They were

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[4] The Board declined to process them solely because of the outstanding order against the employer (R. 347, 351-353).

[5] The Board's petition charged that a member of named company officials had instigated the retention of Brooks (R. 9-10), but its affidavits were silent on this allegation. The answer disputed the allegation (R. 144-145) and each of the named officials submitted an affidavit denying it (R. 246-260, 264-267, 291-294).

[6] In fact, Union representatives were present at the scene of the meeting on the morning of March 28, 1952, but departed before the meeting convened despite specific notice that it had been set for 1:30 p.m. (R. 70, 310, 311, 373-374, 474-475).

[7] The employer offered the exact terms previously rejected by the Union (R. 459) but, after consideration of inequities urged by Brooks, granted slightly higher adjustments for 36 of the 205 employees concerned (R. 74-79, 177). The over-all adjustments

expressly subordinated to any ultimate agreement with the Union (R. 73, 177, 473).[8]

Contempt proceedings were instituted in January 1953 (R. 18). Solely because of the foregoing adjustments, the court below, on the pleadings alone (R. 519), adjudicated petitioners in civil contempt of the provisions of its previous decree directing the employer to bargain with the Union (R. 538).[9] No evidence was taken. The Court disregarded the facts concerning the prior negotiations. It ignored the employer's denial of bad faith on its part (R. 131, 132) and its allegations of bad faith bargaining by the Union (R. 149-152). Intent was held immaterial (R. 527), on the theory that Section 9(a) could not under any circumstances cover the adjustment of wage grievances, at least for "a large percentage of employees in the bargaining unit" (R. 526).

As a penalty for making these adjustments, the court directed the petitioners under threat of heavy fines[10] to purge themselves by (R. 539-540):

> "(1) Withdrawing forthwith from the agreement entered into on or about March 28, 1952, with

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averaged 18¢, but no valid comparison with the 14¢ proposed to the Union is possible, because 71 more employees were covered in that proposal (R. 146). The employer had previously informed the Union of its willingness to discuss and correct any inequities in its proposal (R. 146, 265-266).

[8] At the lone subsequent meeting, in August 1952, the Union remained adamant in its demand for across-the-board increases (R. 46).

[9] Specifically, paragraphs 1(a) and 2(a) of that decree, reproduced in full at R. 18.

[10] Lump sum fines of $30,000 against the employer and $15,000 against its president, plus respective additional sums of $1,000 and $500 for each day of non-compliance (R. 540-541). Although it ignored completely the Board's lengthy charges that the employer had bargained in bad faith, the Court further assessed the employer the full costs of the Board's investigation, including salaries (*Ibid*).

Maurice V. Brooks setting wages and rates of pay for employees in the bargaining unit described in the Court's decree of July 24, 1950;

"(2) Making no further payments of wages or rates of pay to said employees pursuant to said agreement with Maurice V. Brooks; [but respondents may fix wages or rates of pay in any manner and amounts which would have been permissible under the Labor Management Relations Act and this Court's decree of July 24, 1950, if said agreement had not been made;"][11]

No such relief had been requested by the Board. It had sought, instead, an order directing "comparable" increases for the employees who had not retained Brooks, if requested by the Union (R. 16).

A return showing compliance with both the original decree and the contempt decree was ordered to be made within 30 days (R. 540). Under the contempt order (since stayed by the Chief Justice) the employer must immediately reduce the wages of the 205 employees represented by Brooks. Since one of the grounds for the decision of the court below is that the adjustments were too numerous, its effect is to freeze the wages of the majority of the employees at 1951 levels for the duration of the deadlock with the union on the method of negotiating wage increases.

The employees whose wages are thus reduced and frozen were not parties to any of the proceedings in the Court below.

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[11] The matter in brackets was added in response to petitioners' objection to the ambiguity of the order, as originally framed (R. 528-529), with respect to the necessity for reducing and freezing the wages of the affected employees (R. 530-533).

QUESTIONS PRESENTED

1. Whether Section 9(a) of the Act is inapplicable in any circumstances to permit the adjustment of wage grievances of employees in a certified bargaining unit?

2. Whether, as a matter of law and regardless of good faith or other circumstances, such as deadlocked Union negotiations, an employer violates his duty to bargain collectively by adjusting wage grievances of "a large percentage" of the employees in a certified bargaining unit in response to their petitions invoking 9(a) of the Act?

3. Whether a judicial decree, enforcing a Board order directing an employer to bargain, based solely on a legal issue as to the existence of a statutory duty to bargain and involving no issues of good faith, will support contempt charges involving alleged misconduct in subsequent negotiations, without any opportunity for hearing before the Board, and without hearing by the Court of issues raised by the pleadings before it, including the defense that the Union had bargained in bad faith?

4. Whether a contempt decree is proper which (a) fails to specify the conduct required for compliance, (b) requires the reduction of employees' wages in proceedings to which they are not parties, and (c) compels the employer to make concessions to the Union?

THE OPINION BELOW

The decision that petitioners were in contempt on account of the adjustment of wage grievances at the meeting of March 28, 1952, was predicated solely on a conclusion of law. The Court gave no weight to its own findings that "[o]n and after August 8, 1951, bargaining sessions pursuant to paragraphs 1(a) and 2(a) of the [original] decree took place between respondent Company and the Union" and that the employer offered the Union "an average increase of 14 cents per hour" (R. 521 and 521 n. 9). It discounted petitioners' good faith, dismissing intent as

immaterial (R. 527). The Union's opportunity to attend the grievance meeting was also held immaterial (R. 527 n. 24).

Instead, the Court reasoned that, as a matter of law, the wage grievances adjusted by petitioners were not covered by Section 9(a) of the Act. It quoted a labor treatise for the proposition that the term *grievance* "usually refers to 'secondary disputes in contrast to disagreements concerning broad issues such as wage rates, hours and working conditions'" (R. 524).[12] It held that nothing in the legislative history showed any purpose "to give 'grievances' a different meaning in § 9(a) of the Labor Management Relations Act" (R. 525).

The Court below rejected Judge Learned Hand's opposite opinion, for a unanimous court, in *Douds* v. *Local 1250,* 173 F. 2d 764, 768-9 (2d Cir. 1949), that, in the light of its legislative history, the purpose and effect of the 1947 amendment to Section 9(a) was to "put an end to the distinction between 'grievances' and other disputes." Speaking for the majority of a divided court, Judge Bazelon condemned the Second Circuit's view as follows (R. 526):

> ". . . Implicit in that proposition is this unseemly notion: Congress intended § 9(a)'s 'grievances' proviso to abrogate the very rights bestowed by the dominant portion of that section and protected by §§ 8(a)(5) and 8(b)(4)(C). Thus, to affirm that proposition would make meaningless the term *'exclusive,'* and the whole ritual of election and certification, by allowing an employer to bargain as to everything not only with the so-called 'exclusive bargaining representative' but with anyone else. It would obliterate the significant differences between a

[12] As supporting authorities it cited *Hughes Tool Company* v. *NLRB,* 147 F. 2d 69, 72-3 (5th Cir. 1945), construing Section 9(a) as it read prior to the 1947 amendment (p. 2, *supra*), and this Court's decision in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 724, defining the meaning of the term for purposes of the Railway Labor Act of 1934, 44 Stat. 577 (1926), 45 U.S.C. §§ 151 *et seq.*

> union certified as *exclusive* bargaining representative and a non-certified rival union or group." (Footnote omitted).

But there was no reference to the Second Circuit's conclusion that the 1947 amendment of 9(a) broadened the coverage of the term "grievances" without impairing the preferred status of the certified representative. Judge Hand had reasoned that this was so because the amendment authorized adjustments only "as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect" (§ 9(a)). For that reason, he pointed out, the authority of the exclusive representative remains "expressly paramount", for any adjustment "is subject to his power to cancel it" (173 F. 2d at 769).[13]

On the foregoing analysis, the court below decided on the following basis that petitioners had disobeyed its mandate to bargain collectively (R. 526):

> "We therefore hold that fixing wages or rates of pay for a large percentage of the employees in a certified bargaining unit is not an adjustment of 'grievances' within the meaning of § 9(a)'s proviso."

The opinion nowhere explains what is meant by the reference "a large percentage" of employees (R. 526).[14]

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[13] The Second Circuit's opinion is more fully quoted at p. 13, *infra*. The amendatory language which Judge Hand considered crucial was not discussed by the lower Court. It was omitted from the quotation of the statute in the text of the opinion (R. 523-524).

[14] Although admittedly not charged by the Board (R. 522 n. 13) and academic here because it is ignored in the decree (R. 539-541), the lower Court also found contempt of paragraph 2(b) of its original decree. That paragraph directed the employer to post a notice of its readiness to bargain collectively, which was not to be "altered" (R. 20). The violation was found in the posting of an additional notice on August 16, 1951 (R. 522-523, 539). That notice, in fact followed by eight months of negotiations with the Union, stated that the case "was still before the court for final determination" (R. 47), referring expressly to this Court's decision in *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322 (R. 47). As the Court later admitted (*Bethlehem Steel Co.* v. *NLRB*, 191 F. 2d 340 (D.C. Cir. 1951)), *Highland Park* overruled the primary

The Court below dismissed petitioners' counterclaim (R. 153-154) for an order removing its original decree as a bar to the holding of an election (R. 541-542).[15] It overruled, without hearing (R. 519), petitioners' affirmative defense that the Union had not bargained in good faith, but was endeavoring rather to use the injunction and contempt proceedings as a means of avoiding an election and perpetuating itself in power against the wishes of a majority of the employees in the unit (R. 149-152).[16]

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ground of its original ruling against this employer. A timely petition for rehearing of the denial of certiorari to review that ruling, 341 U.S. 939, had accordingly been filed on June 21, 1951, was not denied until October 8, 1951, 342 U.S. 843, and was still pending when the additional notice was posted. (As shown by this Court's records in No. 466, October Term 1950, the lower court's recital that it was filed in September 1951 [R. 518 n. 3] is incorrect.) On October 22, 1951, two weeks after the denial of rehearing, an amendment to the Act immunized employers from liability on account of refusals to bargain because the AFL was out of compliance with 9(h), but it excluded finally adjudicated cases and therefore did not aid this employer. P.L. 189, October 22, 1951, 65 Stat. 601 (1951), 29 U.S.C. § 168. (The Board's petition had referred to the second notice only as one item of a complex of circumstances alleged to show that the employer had not bargained in good faith [R. 3-4, 522 n. 13], an issue which the lower court never considered).

[15] In November 1952, 215 of the employees filed suit in the United States District Court for the Northern District of Texas, praying a mandatory injunction directing the Board to process their petitions for decertification (R. 347-355). The case is still pending.

[16] By letter of April 30, 1953, two days after the lower Court's opinion was entered, the Union requested the resumption of negotiations. The employer agreed by letter of May 7, 1953, and efforts were undertaken to arrange a mutually satisfactory meeting date. The employer then wrote the Union offering a number of concessions on other unresolved issues and requesting prompt discussions on the wage issue. (See Docket No. 10,465 in the United States Court of Appeals for the District of Columbia Circuit, *Report on Voluntary Compliance with Paragraph 5 of the Order of this Court Adjudicating Respondents in Civil Contempt*, filed July 7, 1953). But, after Chief Justice Vinson had stayed the lower Court's decree, the Union declined to negotiate, stating "good faith bargaining is not possible until the actions of respondents found to be illegal by the Court of Appeals have been corrected by the decree" (*Ibid, Comment of Intervenor on Report of Respondents*, filed July 22, 1953, p. 9).

REASONS FOR GRANTING THE WRIT

The decision below shrouds the application of the National Labor Relations Act with doubt and confusion in a number of important respects described below. In particular it is squarely in conflict with the opinion of the Second Circuit concerning the meaning of Section 9(a), an important provision of the Act which has never been considered by this Court. It is also opposed to important decisions of this Court dealing specifically with the administration and enforcement of the Act and more broadly with the basic principles governing the execution of the administrative process.

(1) The erroneous construction of 9(a) and the resulting uncertainty concerning the coverage of the statutory grievance procedure. The lower Court's narrow construction of Section 9(a) is erroneous and contrary to the intended coverage of that provision as shown on its face. Thus the authority for grievance adjustments, not "inconsistent" with an effective labor contract, follows immediately the express reference to "wages, hours and working conditions" as the subjects of bargaining by the exclusive representative. Those are the primary subjects of collective agreements and hence the most likely subjects of conflict with a grievance adjustment. They were uppermost in Congress' mind when it drafted 9(a). The mandate against inconsistent adjustments is accordingly most meaningful in relation to those very matters. In this context the legislative omission to exclude such matters from the area permissible grievance adjustments dictates the conclusion that they were meant to be covered.

The adjustments here were made in the absence of a collective agreement, following futile good faith efforts to achieve one with the Union,[17] and in accordance with the

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[17] The decision here was made against petitioners on the pleadings. "In that situation, all reasonable intendments and inferences from the pleadings are, as a matter of law, to be taken against the movant and in favor of the opponent" (*NLRB* v. *Weirton Steel Co.*, 146 F. 2d 144, 145 (3rd Cir. 1944)).

statutory procedure. They were therefore proper. As shown below, the lower Court's contrary view is opposed to other judicial opinion and to informed scholarship on the subject. It also ignores the plain expression of the legislative purpose in enacting the 1947 amendment.

This Court has never considered the meaning of Section 9(a) of the Act. The only other Court of Appeals opinion construing its coverage is *Douds* v. *Local 1250*, 173 F. 2d 764 (2d Cir. 1949). There a unanimous Court, speaking through Judge Learned Hand, took a precisely opposite view in the light of the same authorities considered by the court below. See n. 12, p. 9, *supra*. It concluded that the 1947 amendment of 9(a) "put an end to the distinction between 'grievances' and other disputes" (*Id.* at 768-769), and gave this answer to the argument that the result would be to undermine the statutory plan for an exclusive bargaining representative (*Id.* at 769):

> "The purpose or scheme, as so amended, seems to us consistent throughout. The certified agent's authority extends to all employees in the 'unit,' including those who have not voted for him; but his election and certification, as such, confer upon him only that authority; they do not, ex proprio vigore, affect the relations between the employer and the employees. They give him power to affect them by contract, *but until he chooses to contract, and in so far as his contract leaves open any points in dispute,* present or future, the employees retain their common-law right to bargain for themselves, singly or collectively. On the other hand, any bargain they may make is subject to his power to cancel it, for in so doing he acts for them as their agent, as much as though they had expressly authorized him to do so. His power to represent all within the 'unit' is absolute and beyond question; but it does not automatically exclude them" (Emphasis supplied).[18]

[18] On petition for rehearing, the Court limited the scope of its original opinion to the facts before it, but without retracting the views previously expressed, and rejected as follows the Board's

The lower Court's interpretation of Section 9(a) is also at odds with eminent scholarship on the specific subject of the coverage of Section 9(a) and with its legislative history. With particular reference to Section 9(a), Professor Cox has explained as follows the scope of the term "grievances" (Cox, *Some Aspects Of The Labor Management Relations Act, 1947, Part Two,* 61 HARV. L. REV. 274, 302 (1948)):

> "Grievances may relate to the establishment of new rates and the adjustment of old; to rulings on seniority, layoffs, and rehires; to discharges and other disciplinary measures; to merit-increases, transfers, promotions; to the operation of an incentive system and countless other measures."

In commenting on the meaning of the 1947 amendment to 9(a), the Senate Committee which reported the bill expressly declared that the intention was to change the previous Board practice which had "received some support from the courts in the Hughes Tool case" and went on to state its affirmative purpose as follows (S. Rep. No. 105, 80th Cong., 1st Sess. (1947) p. 24):

> "The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, *unless the adjustment is contrary to the terms of the collective-bargaining agreement then in effect*" (Emphasis supplied).

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claim that an issue of reinstatement was not a "grievance" within the meaning of the statute (173 F. 2d at 772):

> "We cannot see how it can fail to be, unless the term is to be confined to such complaints as the oppression of foremen, the unfair distribution of the work, or other details of factory management. That it cannot be so confined follows from the fact that under the first proviso a 'grievance' may be a dispute which conflicts with the collective agreement."

The meaning of Section 9(a) is thus left in utter confusion by the opinion below. Not only does it conflict with the statutory language and differ with the *Douds* case on the coverage of the provision, but its own interpretation is hopelessly muddled. In particular, the opinion is unclear whether Section 9(a) has no function whatever for the adjustment of grievances concerning "broad" issues, such as wages, or is merely inapplicable to such issues when the adjustments involve a "large percentage" of employees in a certified unit. It is equally hazy about what percentage of employees constitutes "a large percentage". Certainly, Section 9(a) says nothing about the size of the groups which may invoke Section 9(a)—doubtless for the very good reason that it would be incongruous to invest small groups of employees with greater statutory privileges than large groups.

The decision below accordingly restricts and obscures the utility of the grievance procedure as a medium for settling disputes between employers and employees. The importance attributed to that matter by Congress is evident from its amendment of Section 9(a) in 1947 in order to undo the previous administrative and judicial impairment of the function of the grievance procedure. The clarification of the existing confusion concerning the application of the amended provision warrants the attention of this Court.

(2) The inconsistency of the decision below with established doctrine authorizing unilateral employer action in the event of a bargaining deadlock and requiring consideration of the Union's good faith in appraising the employer's conduct. The administration of the Act is further confused by the action of the lower court in condemning the adjustments without consideration of the facts and issues disclosed by the pleadings. The Board's pleadings here disclosed on their face the lengthy negotiations which preceded the adjustments and also the deadlock in the wage

issue (R. 22-23; n. 3, p. 4, *supra*). Petitioners' pleadings denied the Board's allegations of bad faith (R. 131, 132) and affirmatively charged the Union with bad faith bargaining (R. 149-152).

On such a record, there was no warrant for the determination that as a matter of law, without need of factual inquiry into intent or circumstances, the employer violated his duty to bargain by making the 9(a) adjustments. Whether or not the lower Court properly construed the scope of Section 9(a) as an abstract matter, its determination in this case cannot be reconciled with the doctrine supporting unilateral employer action when collective negotiations are stalemated, if undertaken without "disparagement of the collective bargaining proceedings" (*NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224); *NLRB* v. *Norfolk Shipbuilding & Drydock Corp.*, 195 F. 2d 632, 637 (4th Cir. 1952); *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 150-152 (7th Cir. 1951); *Exposition Cotton Mills Co.*, 76 N.L.R.B. 1289, 1291-1292 (1948); *Sam M. Jackson*, 34 N.L.R.B. 194, 202 (1941). The circumstances and intent of the employer's action here therefore required consideration, particularly since the employer specifically subordinated the adjustments to any agreement ultimately reached with the Union (R. 73, 177, 473).

By holding the instant adjustments to be illegal *per se*, the decision below injects this anomaly into the application of the statute: In identical circumstances, an employer may not do at the behest of his employees, invoking the statutory 9(a) procedure, what he is free to do of his own volition, according to judicially established doctrine. The consequences are as serious as they are illogical. Section 9(a) is read out of the statute in the very situation it was expressly designed to cover, namely the absence of a collective bargaining agreement, and thus in the very con-

ditions when it is likely to be most needed.[19] The condemnation of the use of the statutory procedure for adjusting wage grievances after a bargaining deadlock is apt to make employers hesitant to grant relief by unilateral action. At best, the decision below remits the employees who are the victims of a bargaining deadlock to complete dependence upon the voluntary generosity of their employers.

Furthermore, in refusing to consider the employer's charge that the Union had bargained in bad faith, the lower Court overlooked and clouded the principle that Union misconduct may preclude a finding of refusal to bargain on the employer's part. In the Board's words (*Times Publishing Co.*, 72 N.L.R.B. 676, 682-3 (1947)):

> "The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that, although the Act imposes no affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found."

The importance of this principle is accentuated by the fact that Section 8(b)(3) of the Act, 29 U.S.C. § 158(b)(3),

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[19] This case graphically exemplifies the resulting difficulties. Because of the original decree against the employer, the Board refuses to process the petitions of a majority of the employees to decertify the Union (R. 351-353). Unilateral employer action is inhibited because of the danger of contempt. The lower Court's ruling thus removes the employees' sole remaining avenue of relief notwithstanding a deadlock in negotiations. Conjunctively, the employer is forced to suffer unsatisfactory labor relations. He must either surrender a basic wage policy in order to obtain an unsuitable agreement or ignore the employees' need for relief.

now expressly imposes an "affirmative duty to bargain upon labor organizations". Under the lower Court's view, employers in self-defense would have to file unfair labor practice charges whenever a union engaged in questionable bargaining tactics, particularly in view of the six month time limitation prescribed by Section 10(b) of the Act, 29 U.S.C. § 160(b). The consequences would be unfortunate in two important respects. There would be a discordant impact on the bargaining process and a heavily increased administrative burden on the Board.

(3) The misuse of contempt process to avoid the prescribed administrative hearing, and the consequent denial of petitioners' statutory and constitutional rights to a hearing. The contempt procedure followed below deprived petitioners of their right to a hearing as provided in Section 10(b) of the Act and as required by the due process clause of the Fifth Amendment to the federal Constitution. The original order involved no issues of fact concerning petitioners' conduct or good faith in conducting negotiations with the Union. *See Matter of West Texas Utilities Co.*, 85 N.L.R.B. 1396 (1949); *West Texas Utilities Co.* v. *NLRB*, 184 F. 2d 233 (D.C. Cir. 1950). No negotiations had been held. The sole question was one of law—whether there was any duty to bargain collectively with the Union while the AFL was out of compliance with 9(h) of the Act.

In contrast, the present charges concerned the acts and alleged misconduct of the employer, years later, in the course of lengthy negotiations with the Union. Such charges entitled petitioners to a Board hearing wherein they could exercise "their broad evidentiary rights created by Section 10(b) of the Act" and were inappropriate as a basis for contempt, being "essentially different in kind from those raised in the proceeding in which [the] decree enforcing the Board's cease and desist order was granted"

(*NLRB* v. *Pacific Greyhound Lines, Inc.*, 106 F. 2d 867, 871 (9th Cir. 1939).[20]

By invoking the contempt process in such a situation the Board ignored the warning that "the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future conduct his labor relations at the peril of a summons for contempt on the Board's allegation" (*NLRB* v. *Express Pub. Co.*, 312 U.S. 426, 436). It also disregarded the admonition that the fact-finding responsibilities of administrative agencies are not to be "shift[ed] to the courts in subsequent contempt proceedings" (*FTC* v. *Morton Salt Co.*, 334 U.S. 37, 54).

The Board's abuse of its authority was compounded by the lower Court's improper adjudication of contempt on the pleadings, without hearing of the factual issues they disclosed (R. 519). It thereby ignored the elementary rule controlling the propriety of such a disposition. This was stated as follows by the Third Circuit in refusing a Board motion for judgment on the pleadings in a similar contempt context (*NLRB* v. *Weirton Steel Co.*, 146 F. 2d 144, 145 (3d Cir. 1944)):

> "In that situation, all reasonable intendments and inferences from the pleadings are, as a matter of law, to be taken against the movant and in favor of the opponent."

The pleadings here permitted, if they did not dictate, the inference that the adjustments were made following an ex-

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[20] The necessity of a Board hearing cannot be avoided on the premise that the impropriety of the 9(a) adjustments involved only a question of law. The statute on its face covered them. If vulnerable at all, they could be challenged, like unilateral benefits, only as having been made in bad faith for the purpose of undermining collective negotiations with the Union. Petitioners' pleadings and affidavits denied all of the Board's allegations to that effect (R. 131, 132, 141-146; see n. 5, p. 5, *supra*). These were issues of fact which could not properly be resolved without a hearing.

tensive good faith effort to negotiate an agreement and a deadlock occasioned by the Union's bad faith. See pp. 3-6, 11, *supra*.

The lower court accordingly abused its discretion by deciding the case on the pleadings. Moreover, on the record here, the summary adjudication below violated petitioners' constitutional rights to due process of law by depriving them of a hearing at any "stage." *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 152-3; *Morgan* v. *United States*, 304 U.S. 1; *United States* v. *Illinois Cent. R. Co.*, 291 U.S. 457, 463.

The short-cut procedure thus used against petitioners, in contravention of statutory and constitutional requirements, strikes "at the very foundation" of the entire administrative process (*Morgan* v. *United States, supra*, at 14). It warrants swift rebuke by this Court.

(4) The exercise of remedial authority in contravention of limitations imposed by decisions of this Court and the text of the Act. Petitioners were simply directed to bargain collectively by the original decree of which they were held in contempt. So far as material here, the decree below directs immediate discontinuance of wage payments at the adjusted rates effected pursuant to 9(a), subject only to a qualification authorizing the employer to fix wages "in any manner and amounts which would have been permissible under the . . . Act" and under the Court's original enforcement decree (R. 539). That decree itself was framed in the broad language of the statute (R. 19-20). As will be shown, the contempt decree is accordingly insupportable on several counts.

(a) *Improper expansion of the original decree and lack of requisite specificity.* The decree below is defective because it is both too far-reaching in scope and too indefinite in terms. By condemning the adjustment of wage grievances under 9(a) and directing a wage reduction, it improperly expands the original decree to cover matters it "does not purport to regulate" (*Terminal R. Ass'n.* v.

United States, 266 U.S. 17, 31). The definition of the areas of permitted wage payments solely in broad statutory terms is also a fatal defect. Even an original administrative order would have to define with more particularity the scope of the wage authority permitted the employer. Cf. *FTC* v. *Morton Salt Co.,* 334 U.S. 37, 54. *A fortiori* the contempt decree below, incorporating drastic fines for non-compliance, must fall because it is "too general and vague" (*Terminal R. Ass'n.* v. *United States,* 266 U.S. 17, 29).[21]

(b) *Unauthorized reduction of wages in absence of indispensable parties (i.e. the affected employees).* In its most limited meaning the decree below requires that the wages of most of the 205 affected employees be immediately reduced to 1951 levels and there frozen unless and until an agreement is reached with the Union. Any other construction is foreclosed by these circumstances: (i) the lower Court's condemnation of the March 1952 adjustments for "a large percentage" of those employees; (ii) the absoluteness of its order to discontinue wage payments under those adjustments, coupled with the ambiguity of the purported qualification of that mandate; and (iii) the drastic penalties which would attend a misinterpretation of the decree on petitioners' part.

The order therefore directly adjudicates the contract rights of numerous employees who are not parties to the action and whose presence was indispensable to such an adjudication under the decision of this court in *National Licorice Co.* v. *NLRB,* 309 U.S. 350.[22] There the Court upheld only so much of the Board's order as prohibited the employer from enjoying benefits under the unlawful contracts. Because the employees were not parties, it struck a provision declaring the contracts "void and of no effect"

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[21] The issue here concerns the contempt decree itself, not the original decree as was the case in *McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187.

[22] See also *American Mfg. Co.* v. *NLRB,* 309 U.S. 629; *Regents of University System of Georgia* v. *Carroll,* 338 U.S. 586, 599, n. 17.

and substituted instead a stipulation that the employer could "no longer . . . attempt to enforce such contracts . . . [but] without prejudice to the assertion by the employees of any legal rights they may have acquired under the contracts (*id.* at 367).

There is no room for doubt concerning the meaning of *National Licorice*. As Chief Justice Stone, author of that opinion, later said:

> "It was because the Board purported thus to determine the rights of an absent party which had failed to intervene that we modified its order in National Licorice Co. v. Labor Board . . . ."[23]

Because it compels a reduction in the wages of absent employees, the order below is infected with the same vice. In fact, the Board's own petition discloses that it apprehended this very difficulty. Its prayer for relief sought no curtailment of the 9(a) adjustments. It asked, rather, that petitioners be directed to grant "comparable" increases to the remaining employees in the unit, upon request of the Union (R. 16).

This is a classic case for the application of the indispensable party doctrine. Its function was stated in these terms by Chief Justice Vinson, speaking for the Court below in *Green* v. *Brophy*, 110 F. 2d 539, 541-2 (D.C. Cir. 1940):

> " '[I]rrespective * * * of the extent, technically speaking, of the affect and operation of a decree * * * as res judicata, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected, and the controversy so left open to future litigation, as would be inconsistent with equity and good conscience.' That this represents the proper inquiry is supported by the fact that litigation requiring decision as to the legal consequences to be attached to a relationship where only one party thereto is made a

[23] Dissenting with Hughes, C. J. and Roberts, J., in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 175.

party to the action is perhaps the clearest case of failure to join an indispensable party."

Those exact considerations are inherent in the present situation. The decree of the lower court is not *res judicata* as to the employees concerned. They are therefore free to invoke the March 1952 adjustments as a basis for suit to recover any wages withheld by the employer pursuant to the adjudication in this case. If they recover a judgment, problems will arise concerning the employer's liberty to satisfy it in the light of the decree below. This is apt to precipitate still further litigation. In short, the decree below was entered in disregard of the very conditions in which the indispensable party doctrine is operative and for that reason requires correction by this Court.

(c) *The violation of the statutory injunction against compulsory concessions.* In defining the nature of the duty to bargain collectively, the statute expressly declares that "such obligation does not compel either party to agree to a proposal or require the making of a concession" (§ 8(d), 29 U.S.C. § 158(d)). In contrast the precise effect of the decree below is to compel the employer to surrender to the Union's demand for across-the-board increases. The Board's own pleadings disclose the Union's adamance on this point (n. 3, p. 4, *supra*). The decree below allows petitioners only 30 days to make a return establishing that they have bargained in good faith with the Union (R. 540). The inhibiting effect of the drastic penalties for non-compliance upon continued resistance to the Union's demands is self-evident. In short, contrary to established principle, the decree below improperly subverts "the process of contempt to force an employer, at the instance of the Board, to enter into a particular contract which the Board presses and advocates" (*NLRB* v. *Norfolk Shipbuilding and Drydock Corp.*, 195 F. 2d 632, 634 (4th Cir. 1952).

CONCLUSION

For the foregoing reasons, a writ of certiorari should b
granted and the decision below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 237

WEST TEXAS UTILITIES COMPANY, INC., AND PRICE CAMPBELL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below in the instant contempt proceedings (R. 516-529, 537-538) is not yet reported. The opinion of the court below, pursuant to which the original decree (R. 18-21) was entered, is reported at 184 F. 2d 233. This Court's denial of certiorari to review the original judgment of the

court below is reported at 341 U.S. 939 and its denial of rehearing is reported at 342 U.S. 843.

JURISDICTION

The contempt decree of the court below (R. 538-541) was entered on May 8, 1953. The petition for a writ of certiorari was filed on August 6, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly held that petitioners, by negotiating wage increases with a representative of the employees other than the certified union, violated the decree of the court below requiring petitioners to bargain collectively with the Union as the exclusive representative of the employees.

2. Whether the court erred in adjudicating petitioners in contempt on the admitted facts disclosed by the pleadings.

3. Whether the terms of the contempt decree are valid and proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 21-23.

STATEMENT

A. The Original Proceedings in the Court Below

This case had its origin almost seven years ago in the refusal of petitioners, in the fall of 1947, to

bargain with International Brotherhood of Electrical Workers (A.F.L.), Locals 898, 920 and 1044 (herein called the Union), after the Board, following an election, had certified the Union as the exclusive bargaining agent of the transmission, distribution and service employees of petitioner West Texas Utilities Company, Inc. (herein called the Company). The contempt adjudication below is the culmination of years of litigation to secure petitioners' obedience to the requirements of the National Labor Relations Act.

On July 24, 1950, the court below, pursuant to its decision of July 10, 1950,[1] entered its decree (R.18-21) enforcing an order of the Board and requiring the Company and its officers (1) to bargain collectively with the Union as exclusive representative of their employees with respect to wages, rates of pay, hours of employment and other conditions of employment, and (2) to post throughout the Company's system for 60 days, without alteration or defacement, copies of a notice to the employees stating, in substance, that pursuant to the court's decree the Company would, upon request, bargain collectively with the Union and would not interfere with the Union's efforts to represent the employees. After the court below denied rehearing, the Company secured a stay of issuance of the decree, and two extensions thereof, to permit an application to this Court for certiorari. On May 28, 1951, this Court denied certiorari.[2] On June 5, 1951, the court

[1] 184 F. 2d 233.
[2] 341 U.S. 939.

below issued its decree and, on July 2, 1951, denied the Company's motion for recall of the decree. On July 10, 1951, Mr. Justice Clark denied a stay, and on October 8, 1951, the Court denied the Company's request for a rehearing on its application for certiorari.[3] Thereafter, on February 4, 1952, the court below denied the Company's motion to modify the decree to allow the Company unilaterally to increase wages of employees in the unit represented by the Union. On January 8, 1953, the court below denied a second motion of the Company to modify the decree to eliminate the Company's obligation to bargain with the Union.

B. The Contempt Proceedings in the Court Below

1. The Pleadings

On January 8, 1953, the Board petitioned the court below to adjudge petitioners in civil contempt of court and to institute criminal contempt proceedings against them. The Board's petition (R. 1-80) alleged that petitioners had violated, resisted and disobeyed the decree of the court (1) by posting, on about August 10, 1951, concurrently with and alongside the notice ordered to be posted by the court below, a second notice, hereinafter described (R. 3-4), and (2) by failing and refusing, at all times after issuance of the court's decree, to bargain in good faith with the Union (R. 3). The second notice characterized the notice ordered to be posted by the court as "a routine form notice pro-

[3] 342 U.S. 843.

vided by the Labor Board"; stated, notwithstanding the finality of the court's decree, that the obligation of the Company to bargain with the Union was still "in doubt" and that the case was "still before the Court for final determination"; stated that the Company is "for the time being compelled to start bargaining in good faith" with the Union; and concluded with the statement that the Company proposed "to continue as it has always done to fight with every legal means at hand for the good and welfare of its employees" (R. 47-48).

The Board's petition further alleged that after posting the unauthorized notice, petitioners failed and refused to bargain in good faith with the Union on the critical issues of wages and job classifications (R. 4, 13). More specifically, the petition alleged that after agreeing to meet with the Union on August 8, 1951, over a month after issuance of the court's decree (R. 22), petitioners avoided presenting a definite or specific proposal on wages to the Union until March 10, 1952 (R. 7). Then petitioners presented bad faith wage proposals which plainly discriminated against adherents of the Union and favored antiunion employees (R. 7-8). Thereafter, petitioners failed to allow the Union an opportunity to negotiate with them on the discriminatory wage proposals (R. 8-9). Instead, petitioners aided Brooks, an attorney, to secure authorization from over 70 percent of the employees in the bargaining unit to negotiate wage increases for them, and, in disregard of the Union's status as the exclusive bargaining representative, on March 28,

1952, hastily met and negotiated with Brooks a more favorable wage adjustment for the employees who had designated him than petitioners had offered to the Union for those employees (R. 9-11)[4] Thereafter, the Board's petition in contempt further alleged, petitioners refused to grant the remaining employees, through the Union, the minimum increases granted the Brooks group, or to change the discriminatory wage proposals for them presented to the Union on March 10, and, instead, incited those employees also to select a representative other than the Union through which to bargain (R. 11-12).

The court below ordered petitioners to answer the allegations in civil contempt and directed that the criminal contempt proceedings be held in abeyance (R. 124-127). Petitioners' replies (R. 128, 357) controverted in part the allegations of the petition but admitted that petitioners had posted the unauthorized notice (R. 131) and had negotiated the more favorable wage settlement with Brooks (R. 144-145, 146). In addition, the replies, by way of counterclaim, requested the court below to vacate or modify its decree requiring bargaining with the Union (R. 149-154). This request was opposed by the Board (R. 378-384).

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[4] The wage settlement negotiated through Brooks admittedly provided for an average hourly increase of over 18 cents for the 205 employees claimed to be represented by Brooks as compared to the average hourly increase of 14 cents offered to the Union on March 10, 1952, for all the employees (R. 11, 45). This resulted from petitioners' grant to Brooks of larger increases for about 20 percent of the employees whom Brooks claimed to represent (R. 11).

2. The Decision and Order of the Court Below

On April 28, 1953, after oral argument on the issues framed by the pleadings (R. 517) and the receipt of a further response from petitioners (R. 509-515), the court below issued its decision (R. 516-530), holding that "a trial of the disputed issues is unnecessary," "since admitted matters clearly sustain charges of civil contempt" (R. 519).[5] The court thereupon found that petitioners were in civil contempt of its decree from their admissions that they (1) had posted the second notice altering the meaning and intent of the court's notice and nullifying its remedial effect (R. 519-521, 522-523), and (2) had negotiated the wage increases with Brooks for 205 of the 276 employees in the bargaining unit, thus disregarding the Union's status as the exclusive bargaining representative of the employees (R. 521-522, 523-527). Having found that petitioners had not remedied their prior unfair labor practices by compliance with the decree, the court dismissed petitioners' counterclaim for modification of the decree (R. 529).[6]

In its opinion, the court set forth the terms for petitioners' purging of the civil contempt as fol-

[5] Because of this disposition, we have omitted here numerous details of the conduct alleged by the Board to constitute contempt and the specific answers of petitioners creating the issues of fact referred to by the court below.

[6] The court denied the counterclaim on the basis of the rule that until the effects of unfair labor practices have been remedied, an employer is not relieved of the obligation to bargain with the duly selected representative where the loss of that representative's majority status is attributable to the unfair labor practices (R. 529, n. 32). *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 704, 705.

lows: (1) Withdrawing from the wage agreement negotiated with Brooks; (2) discontinuing wage payments to the employees pursuant to the agreement with Brooks; (3) posting copies of the order to be entered pursuant to the opinion; (4) reimbursing the Board for all expenses incurred in connection with the contempt proceeding; and (5) reporting to the court within 30 days that they had complied with the foregoing directives and with the provisions of the original decree. Further, the court stated that petitioners' failure to comply within the 30 days would result in a fine against the Company of $30,000, and $1,000 a day thereafter for each additional day of noncompliance, and against Price Campbell, its president, of $15,000, and $500 a day thereafter for each additional day of noncompliance (R. 528-529).

On May 8, 1953, pursuant to petitioners' motion (R. 530-537), the court below modified its decision of April 28, 1953, and clarified the provision with respect to the requirement that petitioners cease paying wages pursuant to the agreement with Brooks (R. 537-538). The clarification was in the form of an added provision that petitioners "may fix wages or rates of pay in any manner and amounts which would have been permissible under the Act and this Court's decree of July 24, 1950, if said agreement had not been made" (R. 538). On the same day, the court issued its order adjudicating petitioners in civil contempt and incorporating the above summarized provisions for purgation (R. 538-541). On May 26, 1953, the Chief Justice

granted petitioners' request for a stay of the lower court's order pending application for a writ of certiorari.[7]

Petitioners, characterizing the finding as "academic," do not seek review of the determination that they had violated the decree of the court below by posting the unauthorized notice (Pet. 10, n. 14). The only questions raised concern the validity of the decision and order in respect to the wage negotiations with Attorney Brooks.

ARGUMENT

1. In the teeth of the Board's order and the decree of the court below requiring them to bargain with the Union as the "exclusive representative" of their employees, petitioners admittedly negotiated with an attorney for wage increases for 205 of their 276 employees. They claim now (Pet. 12-15) that this was not a bold evasion of their duty under the Act and the decree, but merely an adjustment of "grievances" which, under Section 9(a) of the Act as amended,[8] could be accomplished

[7] The so-called "Report on Voluntary Compliance with Paragraph 5" of the contempt order filed in the court below on July 7, 1953, to which petitioners make reference (Pet. 11, n. 16), has been stricken from the record by that court.

[8] Section 9(a) reads as follows (the clause added by the 1947 amendment is italicized):

> Sec. 9.(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their em-

"without the intervention of the bargaining representative." It would be startling indeed if the basic statutory duty of good-faith bargaining turned out to mean so little that, after years of litigation establishing an employer's obligation to bargain with a specific union, the fundamental issue of wages could be deftly adjusted as a "grievance" by the employer and an *ad hoc* "representative" of the employees, reserving to the union only a forlorn "opportunity to be present at such adjustment." It is clear, however, that in arguing for such a result, petitioners misread the congressional purpose in enacting the proviso to Section 9(a) and ignore settled principles which are controlling here.

It has long been established that under the Act "it [is] the duty of the employer to bargain collectively with the chosen representative of his employees. The obligation being exclusive * * * exacts 'the negative duty to treat with no other.' " *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 683-684; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 383-384; *cf. Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, 200.

The 1947 amendment to the grievance proviso of Section 9(a) was not designed to unsettle this basic principle. Its purpose, as the legislative history

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ployer *and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.*

makes clear, was simply to clarify the original Act and remove any doubt as to the employees' right to present *grievances* to their employer and obtain adjustments without the intervention of the bargaining representative. The amendment was not intended to permit negotiations directly with the employees on matters other than those encompassed within the term "grievances." Thus, both the House and Senate reports on the amendment explained its purpose to be simply to "make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative * * *."[9] Similarly, during the debates, both Senator Taft and Congressman Hartley affirmed that the proposed revision did not entrench upon the exclusive authority of the bargaining representative to deal with the employer with respect to matters other than grievances, which had been established under the original Act. 93 Cong. Rec. 3624-25, 3834, 4194, 4361-62.[10]

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[9] S. Rep. No. 105, 80th Cong., 1st Sess., p. 24; H. Rep. No. 245, 80th Cong., 1st Sess., p. 34. According to these reports Congress was prompted to adopt the amendment because it felt that the Board had not given full effect to the employees' right to present grievances as "defined in the [original] statute since it has adopted a doctrine that if there is a bargaining representative he must be consulted at every stage of the grievance procedure, even though the individual employee might prefer to exercise his right to confer with his employer alone." S. Rep. No. 105, 80th Cong., 1st Sess., p. 24; H. Rep. No. 245, 80th Cong., 1st Sess., p. 34.

[10] Illustrative of the tenor of Senator Taft's remarks is this statement (93 Cong. Rec. 4194):

> But the contention we make is that the pending bill retains, without limitation, the power of collective bargaining, the power of employees to choose their own representa-

Petitioners' error lies in their effort to define as "grievances" all issues as to terms and conditions of employment, however basic and general such issues may be. In *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U. S. 711, affirmed, 327 U. S. 661, construing the Railway Labor Act, this Court defined "grievances" (325 U. S. at 723-724) as "minor disputes" which "affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality." As the court below pointed out (R. 525), nothing in the language or legislative history warrants ascribing a different meaning to the

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tives, the power to deal with their employer as one man; *and if they can get a majority, all the other employees have to keep quiet and permit the representatives of the majority to bargain with the employer for all of them.* We intend to retain all the benefits of the labor legislation which has been enacted since the twenties, but in the bill we correct injustice after injustice which has developed in the administration of labor laws. [Italics supplied.]

On the House floor, after fears were expressed that the amendment might result in an impairment of the bargaining representative's exclusive authority to bargain with respect to wages, hours and conditions of employment, Congressman Hartley stated that the purpose of the amendment was to give "to the individual employee [the right] to go to his employer on a personal grievance which he might have * * *." Asked whether it was not "a fact that under this provision we have gone in accord with the decisions of the Supreme Court of the United States, which hold that where employees have a grievance, for instance, in connection with the recovery of a certain amount of money claimed due from an employer, they can go to him and complain about it and settle it without having a bargaining agent," Congressman Hartley replied that this statement was "absolutely correct." 93 Cong. Rec. 3624-3625.

term "grievances" as it appears in Section 9(a) of the amended Labor Relations Act.[11]

It follows that the court below was clearly correct in holding that petitioners' wage negotiations and agreement with Brooks on increases for some 70 percent of the employees in the bargaining unit did not constitute an adjustment of "grievances" within the meaning of Section 9(a). Manifestly, the agreement cannot be regarded as an adjustment of a "minor dispute" arising "incidentally in the course of an employment" or as settlement of "specific maladjustments of a detailed or individual quality." The agreement with Brooks effected formal and comprehensive changes in the Company's wage structure. It undertook to dispose of a matter that falls squarely within the exclusive authority of the bargaining representative "as part of the power to contract 'concerning rates of pay, rules, or working conditions.'" *Elgin* case, *supra*, at 739. The agreement was, in short, a plain violation of petitioners' duty under the Act and the court's decree "to bargain with the Union as the 'exclusive representative of all employees' in the bargaining unit with respect to wages [and] rates of pay" (R. 527).[12]

Relying upon a dictum which was withdrawn on

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[11] Indeed, the statements of Congressman Hartley referred to in the preceding note indicate that the term was used precisely in the sense this Court described in the *Elgin* case.

[12] There is no substance in the suggestion (Pet. 15) that the decision of the court below leaves the meaning of Section 9(a) in "utter confusion" because it fails to define what is meant by

rehearing in *Douds* v. *Local 1250, Retail Wholesale Department Store Union,* 173 F. 2d 764 (C. A. 2), petitioners mistakenly suggest a conflict between that decision and the holding of the court below (Pet. 9, 10, 13). That case presented the question, markedly different from the one involved here, whether a dispute over the reinstatement of strikers was a "grievance" which, under Section 9(a), could be settled with a minority union even though the employees had selected another union as their bargaining representative. Holding that the minority union could negotiate with the employer on the reinstatement problem, the court initially declared that the amendment to Section 9(a) "put an end to the distinction between 'grievances' and other disputes" and that "until [the bargaining representative] chooses to contract, and in so far as his contract leaves open any points in dispute, present or future, the employees retain their common-law right to bargain for themselves, singly or collectively." 173 F. 2d at 768-769. However, on rehearing, the court stated, "we do not finally commit ourselves" on the foregoing proposition, and limited its decision to holding that the reinstatement of strikers was a "grievance" within the meaning of Section 9(a) which could be settled through a representative of the employees other than the statutory bargaining representative. *Id.* at 772-773. That decision, expressly eliminating the general

the phrase "large percentage" of employees. The opinion is to be read, of course, in the light of the admitted fact that the increases negotiated with Brooks covered 70 percent of the employees.

language petitioners invoke, obviously creates no conflict requiring consideration by this Court.

2. Petitioners assert (Pet. 15-18) that if the court below had heard evidence, they would have established that an impasse had been reached in the negotiations with the Union; that in these circumstances it would have been permissible for the Company unilaterally to grant wage increases to the employees; and that where an impasse has been reached no sound distinction can be drawn between a unilateral grant of wage increases by the employer and a wage increase negotiated with a representative of the employees other than the duly authorized statutory bargaining representative. There are two decisive answers to this contention. First, assuming that the Brooks wage agreement may be compared to a permissible unilateral wage increase following a deadlock in negotiations, "We do not here have a unilateral grant of an increase in pay made by an employer after the *same proposal* has been made by the employer in the course of collective bargaining but has been left unaccepted or even rejected in those negotiations. Such a grant might well carry no disparagement of the collective bargaining proceedings." *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224 (italics supplied). Here, as the undisputed facts establish (*supra*, p. 6, n. 4) and the court below found (R. 521, n. 9, 522), petitioners as a result of the negotiations with Brooks granted wage increases averaging 4 cents an hour more than the average hourly increases offered the Union. Sec-

ond, while a unilateral wage increase following a good-faith impasse might, in the particular circumstances, "carry no disparagement of the collective bargaining proceedings," a wage increase granted pursuant to negotiations with a representative of the employees other than the statutory representative necessarily tends to destroy the exclusive status of the latter. Cf. *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 385.

Nor can petitioners' action be justified, as they assert (Pet. 17-18), by the suggestion that there had been bad-faith bargaining on the part of the Union.[13] As the Board said in *Times Publishing Co.,* 72 NLRB 676, 682-683, on which petitioners rely, "a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found." See also *Phelps Dodge Copper Corp.,* 101 NLRB No. 103, p. 11. But, as petitioners themselves insist, there was no obstacle in this case which "remove[d] the possibility of negotiations." On the contrary, their claim is that bargaining had not ceased, and that the prospect of agreement with the Union

[13] As their primary argument makes clear, petitioners did not purport to deal with Brooks either because of an impasse with the Union or because of any bad faith on the part of the latter. They dealt with Brooks because, as they claim (Pet. 5), they believed themselves under a duty to meet with him to adjust the employees' "grievances." Petitioners urged the alleged impasse with the Union as a defense for the first time after oral argument below in response to the reply of the Union, which intervened in the proceedings (R. 513-514).

remained, so that their wage adjustments with Brooks were "expressly subordinated to any ultimate agreement with the Union" (Pet. 4-6). Petitioners have, in a word, contended throughout that they merely turned aside momentarily to adjust "grievances" with Brooks, and that this action was consistent with their duty to bargain, which they allegedly continued to fulfill. In these circumstances at least, it is clear that the claim of bad faith on the part of the Union could not justify granting to another representative of the employees terms more favorable than those offered to the Union only a few days before. *Cf. National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224.

We agree with petitioners, then, that "there is no real dispute" (Pet. 4) concerning the situation in which the hasty dealings with Brooks were concluded. We think it clear that this situation was correctly appraised by the court below. Since the admitted facts disclosed in the pleadings fully sustained the conclusion that petitioners had engaged in contumacious conduct, the court, following the customary practice in contempt proceedings under the Act, properly found petitioners in contempt on the pleadings.[14]

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[14] *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. 2d 761, 763 (C.A. 7); *National Labor Relations Board* v. *American Mfg. Co.*, 132 F. 2d 740, 741-742 (C.A. 5), certiorari denied, 319 U. S. 743; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302 (C.A. 2); *National Labor Relations Board* v. *Weirton Steel Co.*, 146 F. 2d 144 (C.A. 3); *National Labor Relations Board* v. *Bank of America National Trust & Savings Ass'n.*, 147 F. 2d 287 (C. A. 9).

3. Petitioners assert (Pet. 18-19) that since the contumacious conduct alleged by the Board and found by the court below was different from that which gave rise to the original enforcement decree, contempt proceedings were improper. But as the court below pointed out (R. 529, n. 32), both the original enforcement proceedings and the contempt proceedings involved petitioners' refusal to recognize the certified representative as the exclusive bargaining representative of the employees. The original decree required petitioners to bargain collectively with the Union as the "exclusive representative" of all the employees in the bargaining unit. Petitioners' subsequent by-passing of the Union and negotiations with Brooks went to the very heart of the bargaining requirement of the decree. To say that contempt proceedings do not lie to reach such conduct merely because different circumstances gave rise to the original decree "would give tremendous impetus to [a] program of experimentation with disobedience of the law" that should not be countenanced. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 192.

4. Finally, petitioners attack the terms of the contempt decree on three palpably unmeritorious grounds.

(a) The claim (Pet. 20-21) that the decree lacks sufficient specificity because it defines the area of permitted wage payments in broad statutory terms demands a precision which is obviously impossible. A determination whether an employer has exceeded the permissible limits must be made in the light of

the circumstances of the particular situation. Hence, the decree is "as exact as the circumstances permit." *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 341.

(b) Contrary to petitioners' contention (Pet. 21-22), the individual employees who were the beneficiaries of the Brooks' agreement cannot be regarded as indispensable parties.[15] In *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 364-365, this Court confirmed the Board's power to require an employer to cease giving effect to an agreement obtained through unfair labor practices, even though the employees who were parties to the agreement were not before the Board. There is no basis for withholding a similar power from a court in contempt proceedings. Those proceedings are also part of the statutory scheme provided by Congress for enforcing the public policy of the Act.

(c) Equally insubstantial is petitioners' final point (Pet. 23), that the decree of the court below compels them to surrender to the Union's wage demands. The decree simply requires petitioners to

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[15] Petitioners' statement in this connection (Pet. 21) that the decree requires them to reduce the wages of these employees to the 1951 levels and freeze them there until and unless an agreement is reached with the Union is not correct. It is no more true here than in any other case that the statutory duty to bargain amounts to a one-sided wage freeze. If petitioners reach a genuine impasse with the Union, they may take the unilateral action with respect to wages which the Act permits—for example, the granting of wage increases offered to and rejected by the Union. *Cf. National Labor Relations Board* v. *Crompton-Highland Mills, Inc.,* 337 U. S. 217, 224; *W. W. Cross & Company, Inc.,* 77 NLRB 1162, 1165.

bargain with the Union in good faith and to report on the negotiations within the time specified. If petitioners carry out the order of the court and in good faith are unable to reach agreement with the Union, the sanctions prescribed by the court have no application.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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National Labor Relations Board.

SEPTEMBER 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the

District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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HAROLD B. WILLEY, C

No. 257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

WEST TEXAS UTILITIES COMPANY, LTD. AND PERRY CAMPBELL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL), INTERVENOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL), INTERVENOR

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Rudolph Bros. of [redacted] v Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 237

WEST TEXAS UTILITIES COMPANY, INC. AND PRICE CAMPBELL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL), INTERVENOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL), INTERVENOR

International Brotherhood of Electrical Workers, (AFL), Locals Nos. 898, 920 and 1044 (hereinafter referred to as IBEW), Intervenor in this cause, respectfully prays that this Court deny the petition of West Texas Utilities Company (hereinafter referred to as the "Company") and Price Campbell, its president, for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, one judge dissenting without opinion, holding the Company and Campbell in civil contempt of the Court of Appeals decree of July 24, 1950, which was issued on June 5, 1951, after the Supreme Court had denied the Company's petition for a writ of certiorari.

DECISIONS BELOW

The opinion and decree of the Court of Appeals in the instant proceeding appear at R. 516-529, 537-541.

The opinion of the Court of Appeals entering the original decree for the violation of which petitioners have been adjudged to be in civil contempt, is reported at 184 F. 2d 233, *cert. denied,* 341 U. S. 439; *rehearing denied,* 342 U. S. 843.

JURISDICTION

The opinion of the Court of Appeals was issued April 28, 1953, and appears at R. 516-529. An order modifying the opinion in certain minor respects was entered May 8, 1953 (R. 537-538). The order of contempt and the directions of the Court of Appeals were also entered on May 8, 1953 (R. 538-541).

The cause arises under the Labor-Management Relations Act of 1947, 29 U. S. C. § § 151, et seq. Jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED

Whether an employer's act of granting wage increases to 205 of the 276 employees in the bargaining unit through a party other than the trade union which is the duly certified collective bargaining agent constitutes civil contempt of a Court of Appeals decree requiring the employer to cease and desist from refusing to bargain collectively with the certified union as the *exclusive* representative of the employees and further requiring the employer, affirmatively, to bargain collectively with such certified union as the *exclusive* representative of the employees; or whether, such conduct can be considered to be in compliance with the court decree because it is described as an adjustment of grievances under Section 9 (a) of the Act.

STATUTE INVOLVED

The statutory provision involved in this case is Section 9 (a) of the Labor-Management Relations Act, 1947 which reads as follows:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

STATEMENT

The IBEW was selected by a majority of the employees in the transmission, distribution and service departments of the Company as their collective bargaining representative and was certified on August 12, 1946, by the National Labor Relations Board as the duly authorized collective bargaining agent (85 NLRB, 1396, 1399). The Company refused to bargain with the IBEW on September 19, 1947, assigning as the sole ground for its refusal to bargain the legal point that although the local and international officers of the IBEW had signed the non-Communist affidavits, the officers of the American Federation of

Labor had not as yet done so. The IBEW filed its unfair labor practice charge against the Company on November 12, 1947, approximately four days *after* the officers of the American Federation of Labor filed the affidavits and the Board issued its complaint against the Company on June 24, 1948 (see Docket No. 10, 465 in the U. S. Court of Appeals for the District of Columbia Circuit, Joint Appendix pages 1-14).

The legal ground assigned by the Company for its refusal to bargain was rejected by the Board on September 19, 1949 (85 NLRB 1396) and on July 10, 1950, by the United States Court of Appeals for the District of Columbia where the Company had filed its petition for review (184 F. 2d 233). The Supreme Court of the United States denied the Company's petition for a writ of certiorari on May 8, 1951 (341 U. S. 439) and also its petition for rehearing of the denial of the writ of certiorari (342 U. S. 843; October 8, 1951).

Collective bargaining commenced on August 8, 1951 (R. 22) approximately five years after the Company was required by Board certification to recognize the IBEW as the exclusive bargaining representative of the employees in the transmission, distribution and service departments. A stay of the Court of Appeals decree which was secured by the Company had expired on May 8, 1951, when the Supreme Court had denied its petition for a writ of certiorari.

The Court of Appeals decree which was entered on July 24, 1950, and issued on June 5, 1951, ordered that the Company, and its officers, agents successors and assigns, shall:

"1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, Locals Nos. 898, 920 and 1044, AFL, as the

exclusive representative of all employees in the Respondent's transmission, distribution and service departments . . . and

(b) Interfering in any other manner with the efforts of International Brotherhood of Electrical Workers, Locals Nos. 898, 920 and 1044, AFL, to bargain collectively on behalf of the employees in the aforesaid bargaining unit.

"2. Take the following affirmative action which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Upon request, bargain collectively with International Brotherhood of Electrical Workers, Locals Nos. 898, 920 and 1044, AFL, as the exclusive bargaining representative of all employees in the aforesaid bargaining unit, with respect to wages, rates of pay, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post in its district and branch offices in Districts A, B, C, E, F, G, H, J and K, copies of the notice attached hereto and marked Appendix A. . . . Reasonable steps shall be taken by the Petitioner to insure that said notices are not altered, defaced or covered by any other material, . . ." (R. 19-21; 518-519).

The Company and Campbell showed their contempt for and disregard of this decree of the Court of Appeals in the first month of negotiations.

Paragraph 2 (b) of the decree properly required that a specified notice to all employees be posted by the Company advising that pursuant to court decree it will bargain collectively with the IBEW as the exclusive representative of the employees in the unit. (R.

520). This notice was necessary to give the employees a true picture of the collective bargaining situation since it was the Company's refusal to bargain which had destroyed the IBEW majority. The Company posted the first required notice on or about August 10, 1951, but on or about August 16, 1951, it posted a second unauthorized notice which is set out in the opinion of the Court of Appeals (R. 520-521, R. 47-48). This second notice completely altered the meaning of the notice required by the court decree.

The second notice of the Company varied the meaning of the first required notice in the following important respects:

(1) By characterizing the notice as a "*routine form* notice provided by the Labor Board" rather than as required by a decree of a United States Court of Appeals enforcing an order of the National Labor Relations Board.

(2) By qualifying the Company's duty to bargain with the statement that the Company was only required to bargain with the Union "for the time being."

(3) By stating that the case had not been finally determined. This latter point is perhaps the most serious violation of paragraph 2 (b) of the decree since the second notice was posted after the Supreme Court had denied the Company's petition for a writ of certiorari and had refused on July 10, 1951, to stay the decree of the Court of Appeals. Previously, the Court of Appeals on June 11, 1951, had denied a motion of the Company to recall its certified copy of opinion and judgment. In the absence of a stay the Company had no valid basis for using its filing of a petition for rehearing as

> authorization to alter the terms of a final order of a United States Court of Appeals. Furthermore, the Company at no time posted a notice advising the employees that the Supreme Court had denied its petition for rehearing as well as its petition for a writ of certiorari.

The court below found the Company and Campbell in civil contempt of paragraph 2 (b) of the decree by reason of the posting of the second notice (R. 519-527).

Petitioners do not challenge this ground of decision by the court below. They seek to make light of this finding of contempt by stating in footnote 14 of their petition that it is "academic" "because it is ignored in the decree (R. 539-541)." Reference to the pages in the record cited by petitioners shows they are in error. The decree entered by the Court of Appeals states that:

> "It is hereby ordered, adjudged and decreed that the respondents West Texas Utilities Company Inc. and Price Campbell are and have been, and hereby are adjudged to be, in civil contempt of this Court by reason of their failure to comply with and obey paragraphs 1(a), 2(a) and **2(b)** of the decree of this Court entered on July 24, 1950 . . ." (R. 539).

That failure to comply with a judicial decree relating to a notice is not an academic matter is evidenced by U. S. v. *United Mine Workers of America,* 330 U. S. 258, 267, 269, 305. The direct violation of the decree by alteration of the notice required by the Court may well have been one of the factors in determining the form of the order and the amount of the conditional fines prescribed by the Court of Appeals in the instant proceeding.

The Court of Appeals also found that a second violation of its decree had occurred on March 28, 1952, in connection with the bargaining by the Company with Attorney Brooks.

The status of the collective bargaining negotiations in the two and one-half weeks preceding March 28, 1952, is set forth in the pleadings as follows: On March 10, 1952, the Company submitted a written proposal on wages. (R. 40-41). The IBEW took these proposals under consideration and tentative arrangements were made for a meeting on March 18 (Ibid). This meeting was not held and the IBEW tried to make arrangements by telephone for another meeting. The IBEW on March 24, 1952, wrote the Company a letter referring to the telephone calls and stated its position on the Company's proposal of March 10 (R. 67-69). This letter did not break off negotiations. On the contrary, it concluded with the following statement, "The union is hopeful that you will reconsider your position and advise promptly of your willingness to alter your position with respect to at least some of the matters presently in issue." (Ibid).

No reply was made to this letter by the Company prior to its negotiations with Attorney Brooks. On March 28, 1952, the Company after meeting with Brooks granted wage increases in the average amount of 18 cents per hour to 205 of the 276 employees in the bargaining unit. This increase was higher than the 14 cents average increase offered the Union on March 10, 1952 (R. 521, 522).

The Company replied to the IBEW letter of March 24, 1952, on April 2, 1952, five days after the negotiation between the Company and Brooks (R. 71-73). The Company's letter of April 2, 1952, shows that the Company did not consider there had been any disruption

in the collective bargaining negotiations with the IBEW. The letter stated that "We [the Company] made it very clear to the employee committee that their action could in no wise affect the status of the IBEW as the certified bargaining agent, and that the increases put into effect were contingent upon and subject to the tenor and form of the labor contract which was eventually agreed upon by the Company and the Union." Indeed, the Company's letter went on to suggest Tuesday, April 8, 1952, as an immediate date for the resumption of bargaining. (R. 73).

The sole justification offered by the Company in its letter of April 2, 1952, for its negotiations with Brooks was that the Company felt that it had a duty to meet with its employees:

> "A Mr. Maurice Brooks, attorney of Abilene, Texas, presented us with petitions containing signatures of some 75 or 76 per cent of the employees within the unit demanding that we meet with them on the matter of adjusting grievances. We felt that we had no choice in the matter but to meet with them under that Section [9 (a)], concluded that we must notify the Union, and that we must meet with such employees." (R. 72).

The Company did not claim that it had met with Brooks or granted the wage increases to its employees through a party other than the duly certified bargaining agent because of an alleged impasse or deadlock in the negotiations. (R. 71-73).

The Court of Appeals held that the Company and Campbell had violated paragraph 1 (a) of the decree which directed the Company and its officers to cease and desist from refusing to bargain with the Union "as the *exclusive* representative of all employees" in

the bargaining unit and paragraph 2 (a) of the decree which directed the Company and its officers "to bargain collectively with [the Union] as the *exclusive* bargaining representative of all employees in the bargaining unit, with respect to wages [and] rates of pay." The Court of Appeals adjudged petitioners herein to have violated these paragraphs of the decree by bargaining with Brooks and by reaching an agreement with him to alter wage rates. (R. 526-527).

The Court of Appeals ruled that these direct and literal violations of its decree were not affected by Section 9 (a) of the Act relating to the adjustment of grievances. It was the Court's opinion that grievances are "secondary disputes" of a "comparatively minor character" which do not encompass the setting of wage rates for a large percentage of the employees in a certified bargaining unit. (R. 524-525). The Court of Appeals gave careful consideration to the dictum of Judge Learned Hand in *Douds v. Local 1250,* 173 F. 2d 764, 768-9, 772 and noted that on petition for rehearing, Judge Hand limited his original view by stating that "We do not finally commit ourselves upon the proposition." The opinion of the Court below after reviewing the legislative history of Section 9 (a) and the applicable authorities pointed out that if petitioner's contentions were accepted the entire procedure of the Act on election and certification would be made meaningless since the *exclusive* representative would not be significantly different from a non-certified union inasmuch as the latter could then engage in collective bargaining for its group on such major issues as wages. (R. 524-526).

ARGUMENT

It is respectfully submitted, notwithstanding petitioners' application of such characterizations and adjectives in their petition as "doubt and confusion" (Pet. 12), "hopelessly muddled" (Pet. 15) and "equally hazy" (Ibid) against the opinion of the court below, that this is a simple case of a warranted application of the civil contempt power of a Court of Appeals to secure enforcement of its decree under circumstances which do not call for the granting of the writ of certiorari.

The fundamental rule of collective bargaining with a duly authorized collective bargaining agent was laid down by Chief Justice Stone in *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678, 683-684:

> "The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representative of his employees. The obligation being exclusive, see Sec. 9 (a) of the Act . . . *it exacts the 'negative duty to treat with no other'.*" (Italics supplied).

It was precisely this duty which petitioners violated when they negotiated with Attorney Brooks, a party other than the duly certified bargaining agent.

Petitioners cannot excuse their breach of duty to bargain as specified in the court decree under the color of the right to adjust "grievances" provided by Section 9 (a) of the Act.

As stated by the Court below, the grievance proviso of Section 9 (a) cannot be interpreted to nullify the election and certification procedures of the Act which are intended to provide an orderly means for selecting the *exclusive* bargaining representative of the employees in the unit with whom the employer is required to

bargain collectively. The petitioners' contentions, if valid, would result in a situation whereby the employer could defer bargaining with the elected representative until after the employer had settled such major issues as wages with an attorney representing a group of the employees who are legally represented by the duly certified agent or by a rival union which had previously lost the election. Congress certainly did not intend by amending the grievance proviso of Section 9 (a) that labor-management relations in the nation should be severely disrupted or that the procedure for election and certification of exclusive bargaining representatives be repealed.

The amendment had no such grandiose purpose. It was primarily intended to accomplish a change in the Board practice of permitting the Union to negotiate with the employer at each stage of the grievance presented by the individual employee and limiting the employee's individual right to the *presentation* of his grievance. Under the amendment the individual employee or the employee group could be free of union participation at each stage of the grievance procedure except the final adjustment when it was required that the union representative be given an opportunity to be present. It was also provided that since the grievance could be adjusted directly between the employer and the individual employee or the employee group, such adjustment should not be inconsistent with the collective bargaining agreement then in effect. *Senate Report 105, 80th Cong.*, p. 24.

Even such an ardent advocate of the Labor-Management Relations Act, 1947 as Chairman of the House Labor Committee Hartley made it entirely clear that the proposed revision in the grievance procedure of Section 9 (a) had nothing to do with wages and terms

and conditions of employment. NLRB, *Legislative History of the Labor Management Relations Act*, 1947 p. 781.

It is respectfully submitted that petitioners' extravagant interpretation of Section 9 (a) does not raise an important question of federal law which requires the consideration of the Supreme Court.

Nor is the decision of the United States Court of Appeals in conflict with the decision of another circuit court of appeals on the same matter. *Douds v. Local 1250, supra,* did not involve the same question of the power of the employer to negotiate an agreement with a party other than the duly certified bargaining representative changing the wages of a substantial majority of the employees in a bargaining unit.

The Second Circuit Court of Appeals held that picketing by an uncertified union to secure reinstatement of certain discharged employees did not violate a decree which was interpreted by the court as restraining said union from engaging in labor activity having the object of forcing the employer to recognize the said union as the bargaining agent for the "unit," 170 F. 2d 695; 173 F. 2d 764, 770. The broad language used in the dictum referred to by petitioners, i.e., that the 1947 amendments to Section 9 (a) "put an end to the distinction between 'grievances' and other disputes" was specifically limited on a petition for rehearing to the proposition that the "reinstatement" of the employees in that case constituted a grievance within the meaning of the proviso. 173 F. 2d 764, 772.

Nor can petitioners excuse their breach of duty to bargain with the IBEW by fleeting references to a "deadlock on the wage issue" (Pet. 4) and an effort to bring this case within the rule that unilateral adjustments can be made by the employer after a bona

fide impasse or deadlock has been reached in the negotiations.

As pointed out above in the Statement (pp. 8-9 *supra*) there was no impasse in the negotiations at the time the agreement was reached by the Company and Brooks. Indeed, the Company did not at that time claim any such impasse although their position was stated by legal counsel for the Company. (R. 71-73).

No such claim was made although the Company well knew the rules relating to an impasse. The Company filed a motion in the United States Court of Appeals for the District of Columbia on January 15, 1952, to modify the decree by suspending its operation. (Docket, No. 10,465). The motion relied primarily upon a suit filed in the Federal District Court for the Northern District of Texas, Fort Worth Division by Griffin, an employee, for himself and other employees against the National Labor Relations Board to require a hearing on a petition for decertification.[1] The Company's reply to the opposition to the motion to modify stated that: "Petitioner cannot grant a wage increase because no impasse has been reached. The Board itself has held time and again that unilateral granting of wage increases before empasse (sic) is reached is bad faith and refusal to bargain." This motion to modify was denied in a per curiam decision of the Court of Appeals on February 4, 1952.

A second motion to modify the decree was filed by the Company on December 15, 1952, after it had been

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[1] *Griffin v. Elliott*, Civil Docket No. 2275 U. S. D. C. No. Dist. Texas was voluntarily dismissed with prejudice on October 4, 1952. A similar proceeding, *Moore v. Elliott*, Civil Docket No. 2503, U. S. D. C. No. Dist. Texas which is referred to in footnote 15 of the Petition as "still pending" was dismissed in an opinion issued by Federal District Judge Davidson on July 21, 1953.

notified by the Board that contempt proceedings had been authorized. In this motion, the Company referred to the negotiations with Brooks solely in terms of a Section 9 (a) grievance adjustment. The Company referred to the bargaining during the period January, 1952, to August, 1952, in the following language:

> "That since the latter part of January, 1952, the bargaining committees of the respective parties have met at various intervals, and while many of the issues between them have been settled, as set out above, and agreed upon in writing as set out above, the respective *committees did come to a complete impasse regarding certain issues during the month of August, 1952.* That the Petitioner and the Union have met in bargaining sessions since August, 1952, even up to the present time at intervals mutually agreed to between the parties, but have not been able to reconcile some of their differences and are, at the present time, in temporary recess, only by mutual agreement as a result of certain information having been served upon Petitioner by the office of the General Counsel of the National Labor Relations Board, which information shall be more particularly set forth hereinafter." (Italics supplied).

The pleadings show only a disagreement on the question of wages and do not show an impasse in negotiations on March 28, 1952, at the time of the bargaining with Brooks.

Even if the pleadings showed an impasse, petitioners nevertheless violated the decree by granting employees represented through Brooks an average increase of 18 cents an hour (R. 522) although its highest offer to the Union was an average increase of 14 cents an hour. The higher rate was not first offered to the Union

before being put into effect. This was in violation of the rule laid down by this Court in *NLRB v. Crompton-Highland Mills*, 337 U. S. 217.

Petitioners have raised other points which do not constitute error on the part of the court below or grounds for the granting of the writ of certiorari.

Included among these points is the marginal note "Improper expansion of the original decree and lack of requisite specificity." (Pet. 20-21). The power of the courts to employ judicial sanctions in civil contempt proceedings to coerce compliance has been noted by the court below (R. 528) and by this Court in *U. S. v. United Mine Workers of America, supra*, 303-304. Furthermore, judicial decrees of even more general character than the instant decree have been upheld by this Court "where a proclivity for unlawful conduct has been shown." *McCombs v. Jacksonville Paper Co.*, 336 U. S. 187, 192.

The Company's record in this regard is unexampled. There follows a brief outline of the violations of law found against the petitioners by the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the District of Columbia Circuit and the National Labor Relations Board:

1. *NLRB v. West Texas Utilities Co.* (C.A. 5), 119 F. (2d) 683 (1941)—*enforcing* 22 NLRB 522 (1940).

The Company and its officers engaged in labor espionage, discharged employees for union activity and established a company dominated union during an organizing campaign started by the IBEW in 1937.

2. In the matter of *West Texas Utilities Co.*, 51 NLRB 269 (1943).

Company and its officers interfered with the rights of its employees under section 7 of the Act.

3. *West Texas Utilities Co. v. NLRB* (C.A. D. of C.) (1950), 184 F. (2d) 233 *enforcing* 85 NLRB 1396 (1949) pet. for cert. den.—341 U. S. 939 (May 28, 1951) pet. for rehearing den.—342 U. S. 843 (October 8, 1951).

Company and its officers refused to bargain with IBEW, the duly certified bargaining agent.

4. *NLRB v. West Texas Utilities Co.* (C.A. 5), 195 F. (2d) (1952) *enforcing* 94 NLRB 1638 (1951).

Company and its officers discharged and laid off employees for union activity and engaged in surveillance of union meetings.

5. *West Texas Utilities Co. and Price Campbell v. NLRB,* (C.A. D. of C.) decided April 28, 1953.

Company and Campbell, its President, adjudicated in civil contempt of Court of Appeals decree issued July 24, 1950, and stayed until June 5, 1951, pending action of Supreme Court of U. S. on petition for certiorari.

In addition to the above record of law violations, it should be noted that just as the Company has refused to bargain with the certified representative of the unit of distribution employees, it has recently taken similar unlawful action with respect to the employees in the power plant bargaining unit.

On August 28, 1953, the National Labor Relations Board found that the Company had refused to bargain with the IBEW for the employees in the power plant division. (106 NLRB No. 140). The IBEW had previously been certified by the Board as the exclusive bargaining representative of the employees in the power plant division as the result of an election won by the IBEW in December, 1951.

Petitioners endeavor to support their contention that it was the Union, not the petitioners, who bar-

gained in bad faith by the material set forth in footnote 16, page 11 of the Petition. This material is cited by petitioners as Docket No. 10,465 in the United States Court of Appeals for the District of Columbia Circuit. The fact is that the material relied on by petitioners was stricken from the official Docket in a per curiam order of the Court of Appeals dated August 5, 1953.

Although footnote 16 of the Petition refers to events occurring after the adjudication in civil contempt, which are not in any way relevant to this proceeding, it is deemed advisable in the interest of accuracy to set forth the statement of Attorney Wells from which an incorrect and incomplete quotation has been drawn by the petitioners:

> "I [Wells] would advise you [Attorney Cain of the Company] on behalf of IBEW Locals Nos. 898, 920 and 1044, AFL, that in view of the consistent record of respondents [Company and Campbell] in violating the Act over the course of many years, good faith bargaining is not possible until the actions of respondents found to be illegal by the Court of Appeals have been corrected *in conformity with the decree* and that we proposed to maintain the status quo in accordance with the stay of the decree of the Court of Appeals granted by Chief Justice Vinson of the United States Supreme Court on May 26, 1953." (Italics supplied). (*Comment of Intervenor on Report of Respondents,* filed July 22, 1953, p. 9).

The italicized phrase "in conformity with the decree" is rendered erroneously in the Petition as "by the decree."

The fact is that the Union's request for bargaining was made after the decision of the court below but before petitioners had requested and secured a stay.

The reason for the Union's subsequent action is set forth in the above quotation.

Petitioners' contention that the contempt process has been misused by the court below to avoid the "prescribed" administrative hearing (Pet. 18) amounts to the unusual proposition that there is no terminal point to the current litigation. Since each step in the litigation requires time, petitioners would always be in a position to claim that the lapse of time caused by its violation of law and the legal proceedings required thereby calls for another administrative hearing which will produce an administrative order not enforceable until after further judicial proceedings. This is the very "program of experimentation with disobedience of the law" condemned by this Court in *Maggio v. Zeitz*, 333 U. S. 56 and *McCombs v. Jacksonville Paper Co., supra.*

CONCLUSION

The Court of Appeals made a correct decision within the scope of its power to adjudicate civil contempt on the facts admitted in the pleadings. The petition does not set forth adequate reasons to warrant further review of the case by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1953.

FILED
SEP 16 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 237

WEST TEXAS UTILITIES COMPANY, INC. and PRICE CAMPBELL, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL), *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

This reply brief is necessitated because the opposing briefs make factual assertions which distort the record and disregard the crucial fact that the judgment below was entered on the pleadings, without hearing. There is no need to elaborate upon our differences with the other parties concerning the meaning of the contrary opinion in *Douds* v. *Local* 1250, 173 F. 2d 764 (2d Cir. 1949), the distinguish-

ing factors in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, or the significance of *National Licorice Co.* v. *NLRB*, 309 U.S. 350. An analysis of those opinions amply sustains the views expressed in our petition. It should be noted, however, that in the opinion on *rehearing* in the *Douds* case, Judge Hand considered and rejected the precise argument again urged by the Board here with respect to the applicability of the *Elgin* case. See 173 F. 2d at 771. It is also noteworthy that in the same opinion the Court held that the employees could select their own representative for the presentation of grievances under Section 9(a), including another union. See 173 F. 2d at 772. The opinion below is in complete conflict on both points.

However, we cannot permit to go unchallenged the factual inaccuracies on which the opposing briefs are grounded. It is elementary that where a judgment is made without considering evidence, every disputed fact must be resolved in favor of the party against whom the judgment is entered. Every allegation, recited at pages 5-6 of the Brief in Opposition for the Board was made in its petition below (R. 1-18) and controverted in the answer (R. 128-154). They afford no basis for an adjudication against petitioners.

(1) The Board endeavors to avoid the difficulties created by *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224, by the inaccurate statement that petitioners' pleadings "admitted" that they "had negotiated the more favorable wage settlement with Brooks". (NLRB Brief 6). It then states that "petitioners as a result of the negotiations with Brooks granted wage increases averaging 4 cents an hour more than the average hourly increases offered the Union." (NLRB Brief 15). The fact is, however, that petitioners' pleadings squarely denied that the adjustments effected with Brooks were more favorable than the proposal which had previously been made to the union. Thus, it was stated in answer to that allegation (R. 146):

"The attempted comparison of its proposed average increase of 14¢ to the Union and the 18¢ average increase accomplished in the adjustment of grievances through Brooks is fallacious in that the former covered 276 employees and the latter only 205. Moreover, the adjustments effected through Brooks were essentially the same as those proposed to the Union and the few variations reflected modifications of inequities which would have been effected with the Union had it ever made any effort to negotiate on any basis other than an across-the-board increase, either before or after the meeting with Brooks."

The point is that the comparison of the average increases is misleading because the increases first offered to the Union and later granted in the grievance meeting were variable as between employees. Hence the comparison could be meaningful only if the identical employees were covered in both instances—which was not the case. The fact is that the proposal in the grievance meeting was identical with that previously turned down by the Union and the few departures resulting from the meeting were trifling and insubstantial. See Pet. n. 7 at 5-6. Hence, wholly apart from the independent support afforded the adjustments by virtue of the provisions of Section 9(a), the allegations of petitioners' pleadings establish complete conformity with the principle endorsed as follows in the *Crompton-Highland Mills* case (337 U.S. at 225):

"We hold that the Board's order to cease and desist is justified, under the circumstances of this case, to the extent that the order requires the employer to cease and desist from refusing to bargain collectively by taking action, without prior *consultation* with the authorized collective bargaining representative of the employees, with respect to general rates of pay which are *substantially* different from, or greater than, any which the employer has proposed during its negotiations with such representative." (emphasis added).

Here the Union chose to avoid "consultation" by abstaining from the grievance meeting (Pet. 5) and the adjustments were "substantially" the same as the increases previously rejected by the Union. At the least, the issue could not be resolved against the employer without evidence.

(2) The intervenor asserts that there was no "impasse" as to the time of the Brooks adjustments and that, therefore, the *Crompton-Highland Mills* case is immaterial. (IBEW Brief 12-16). This statement, essential to the intervenor's argument, is contrary to the record. The relevant excerpts from the Board's pleadings below, quoted at page 4, footnote 3, of our petition, establish a stalemate. Significantly, the Board itself does not challenge this fact.

Next, the intervenor implies that the employer lost its right to adjust wage grievances, without Union participation, because it was thereafter still willing to meet and negotiate with the Union. The relevant portion of the *Crompton-Highland Mills* case itself recognizes that a unilateral increase may be made "without prejudice to the rest of the negotiations". (337 U.S. at 225). To penalize an employer because he is willing to continue bargaining, notwithstanding eight months of deadlock, is opposed to the entire philosophy of the Act.

(3) The intervenor lays great stress on matters completely outside the record to challenge petitioners' good faith. (IBEW Brief 16-17). Three of these citations refer to the presentation of previous phases of this case to the courts. In this connection this Court upheld the original contention of the employer that it was necessary for the officials of the A.F.L. to take the Taft-Hartley oath. (See Pet. n. 14 at 10-11). The other two decisions mentioned are completely extraneous and played no part in the decision of the lower court.

(4) Both the Board and the intervenor also attempt to inject the extraneous issue of the lower court's finding of contempt on the basis of the additional notice posted by the

employer. This occurred while the case was pending on rehearing before this Court, shortly after the contrary decision in *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322. The facts in this connection likewise appear at footnote 14, pages 10-11 of our petition. The court below refused to find that this was an intentional violation of the decree. No relief was ordered on this account. We therefore could not and did not raise this question in our petition. It is entirely irrelevant here.

Respectfully submitted,

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